No. 14,089

IN THE

United States Court of Appeals

For the Ninth Circuit

MICHAEL CAMPODONICO,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the District Court of the United States for the Northern District of California.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

A STATEMENT OF THE PLEADINGS AND FACTS DISCLOSING THE BASIS UPON WHICH IT IS CONTENDED THAT THE DISTRICT COURT HAD JURISDICTION AND THAT THIS COURT HAS JURISDICTION TO REVIEW THE JUDGMENT IN QUESTION.

The appellant, Michael Campodonico, was indicted on November 26, 1951, in the District Court for the Northern District of California, Northern Division, as follows:

COUNT ONE—for willful and knowing attempt to evade and defeat income tax due and owing by him and his wife for the year 1946, by means of the filing

of a fraudulent joint income tax return which understated their income tax in the amount of $11,730.98.

COUNT TWO—for willful and knowing attempt to evade and defeat income tax due and owing by him for the year 1947, by means of the filing of a fraudulent income tax return which understated his income tax in the amount of $2,237.47.

COUNT THREE—for willful and knowing attempt to evade and defeat income tax due and owing by his wife, Esther Campodonico, for the year 1947, by means of the filing of a fraudulent income tax return which understated her income tax in the amount of $2,317.97.

COUNT FOUR—for willful and knowing attempt to evade and defeat income tax due and owing by him and his wife for the year 1948, by means of the filing of a fraudulent joint income tax return which understated their income tax in the amount of $488.52.

COUNT FIVE—for willful and knowing attempt to evade and defeat income tax due and owing by him and his wife for the year 1949, by means of the filing of a fraudulent joint income tax return which understated their income tax in the amount of $4,775.94.

The appellant was arraigned on November 30, 1951, before United States District Judge Dal M. Lemmon, at which time appellant entered a plea of not guilty to each count of the indictment. The case came on for trial on May 13, 1952, before the Honorable Oliver J. Carter, judge. Jury trial was waived by

the appellant. (R. 30.) At the close of the Government's case, on May 14, 1952, the appellant moved for judgment of acquittal (R. 228), and the trial was continued until further order of the Court in order that briefs might be submitted and appellant's motion be given full consideration by the Court. On August 8, 1952, appellant's motion for acquittal was denied (R. 233), and the United States reopened its case in chief for further testimony. (R. 234.) On August 8, 1952, appellant's motion for judgment of acquittal was renewed and denied, the appellant rested, and the case was continued to September 5, 1952, for final argument, on which date the case was submitted.

On June 13, 1953, Judge Oliver J. Carter adjudged the appellant guilty as charged in each count of the indictment. On July 17, 1953, appellant moved for arrest of judgment, which was denied, and a motion for judgment of acquittal was granted as to Counts 4 and 5. Motion for a new trial was also denied on that date. On July 17, 1953, Judge Carter sentenced the appellant to imprisonment for a period of 18 months and a fine of $5,000 on Count 1; to imprisonment for a period of 18 months on Count 2, said terms of imprisonment to run concurrently; and to no imprisonment or fine as to Count 3. Notice of appeal was filed on July 27, 1953, and bail on appeal was set at $6,000.

STATUTE INVOLVED.

Title 26, Int. Rev. Code; Sec. 145(b).

PENALTIES

* * * * * * *

(b) Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

SUPPLEMENTAL STATEMENT OF THE CASE.

Appellee's statement of the case is largely predicated on Exhibit 7, which is an oral, uncorroborated, extrajudicial statement made by appellant to his attorney and agents of the Government. It is submitted without this statement there is no substantial evidence upon which to sustain this conviction.

It is interesting to note that the opening pages of the appellee's brief abound in references to appellant's reputation and character as far back as the early 1920's (Appellee's Brief, page 4), where he is referred to as a pimp, a bootlegger, and a gambler. Appellant has, however, confidence in the fact that

these references to a former life will not prejudice his case before this Court. Attention of the Court is here invited to the additional facts contained in Exhibit 7 that he was married in 1938; that he adopted a little girl through the Department of Social Welfare of the State of California in 1946; and that there is not on iota of evidence in this record that from 1943 to the present time that appellant was engaged in any occupation except that he was an employee of a gambling establishment. There is no argument with the rule on appeal that the facts of a case must be stated most favorable to the Government, but it is submitted that this rule does not mean that the facts pertinent to the issue may be ignored and isolated unsupported facts may be supplanted for the testimony in the case. For example, the following facts unequivocably appeared from the evidence: That appellant did not gamble at his place of employment, and that Joe Gianelli, a witness for the appellee, testified that he had known appellant for thirty years and that he never knew him as a gambler. (R. T. p. 94.) (See also R. T. p. 96, R. T. p. 87.) Throughout the entire record, all of the witnesses are in accord that appellant never, never won any substantial sum in gambling and that appellant did state to all witnesses that he had large sums of cash prior to December 31, 1945. These are very significant points, in view of the statement made by counsel for the appellee, that he was going to prove at the outset of the trial the great increase in net worth from "Large Gambling Winnings".

Again, where in this record is there any evidence of gambling winnings? It was established beyond any peradventure of a doubt from the Government's own witnesses that appellant had large sums of cash on hand prior to December 31, 1945, and that he made no substantial sums of money gambling during the years in question.

QUESTIONS PRESENTED IN THIS CASE.

The questions presented in this case for decision on appeal are set forth in both appellant's and appellee's Opening Briefs, and will not be repeated herein.

ARGUMENT.

Appellant has no argument with the general principles of law regarding such elementary matters as the rights and duties of an Appellate Court or with such fundamental rules of law that proof of the corpus delicti must be established before the extrajudicial statement of the defendant is admissible, etc.

In a net worth case, based on the expenditure method of proof, a solid beginning net worth and a probable source of income must first be established.

The argument in this case is simply that the Government utterly failed to prove two essential elements in a net worth (tax evasion) case, namely, a reasonable beginning net worth and source of income. The Government, by the argument in its brief, takes

comfort from Exhibit 7 to establish source of income. The Court's attention is invited to other portions of Exhibit 7, which are studiously avoided by the appellee, namely, the amount of cash on hand at the end of 1945. It is submitted that this statement was inadmissible upon the same legal grounds as it was in *Calderon v. United States,* 207 F. 2d 377 (C.A. 9th 1953), namely, that the corpus delicti had not been established. Assuming its admissibility to have been proper, can it be said that in the face of constant and repeated assertions by the appellant that he had large sums of cash on hand on December 31, 1945, be entirely ignored?

The testimony of the revenue agents is that as a result of their investigation, they found no evidence of cash on hand. Their investigation consisted only of searching all banks and public records. In the face of leads that appellant gave these agents, was there not a great dereliction of duty in failing to make some inquiry regarding cash on hand?

Attention of the Court is here invited to the cursory investigation which must have been made by the revenue agents when they failed to even inquire if appellant had a safety deposit box in prior years. Mr. Taynton testified that in computing the beginning net worth, he did not know that appellant continuously had a safety deposit box in the Bank of America since 1936 and that on January 2, 1943, appellant had not one, but two safety deposit boxes, and that one of these was a large one. (R. T. pp. 179, 180, 181, 182.)

See R. T. pp. 299, 300 for a stipulation between counsel that appellant had safety deposit boxes, entirely overlooked by the Government. In the face of this evidence, together with appellant's constant reiteration of cash on hand, can it be said that the beginning net worth is accurate or reliable? Moreover, as though this were not self-evident, reference is hereby made to the insert which is reflected opposite Page 5 of Appellee's Brief. Note no cash at all is taken into account on December 31, 1945. Yet in the 5th month of 1946, appellant pays cash for a house in the sum of $22,500.00. Can it be contended with any reasonableness that this cash was acquired by appellant in his gambling activities which are entirely negatived by the evidence, inasmuch as all witnesses testified appellant made no money gambling. Considering this purchase made, nevertheless, in the fifth month of 1946, it is apparent that in view of the statement of appellant that he had over $50,000.00 in cash in 1943 (Ex. 7), and in view of the overlooked safety deposit boxes, that appellant had some cash on hand which was not taken into account in computing the net worth beginning. Accordingly, as was held in the *Calderon* case,

> "Absent such a starting item as, say, cash on hand the remainder of the statement proves nothing."

Obviously, counsel who prepared the brief for the appellee was oblivious of this holding in the *Calderon* case, for in the appellee's brief, p. 26, appears this statement:

> "Of all the items comprising the net worth, appellant's brief only questions the lack of a cash on hand item as of December 31, 1945."

A bold assertion that the examining officers found no other assets does not indicate that the examining officers' search was exceptionally thorough.

The trial Court's remarks (cited in appellant's Opening Brief, pp. 39-40) concerning cash on hand may be considered by this Court as a significant expression of the failure of proof on the part of the government.

I. NO SOURCE OF INCOME WAS ESTABLISHED.

There is absolutely not one scintilla of evidence that appellant made any substantial sum in gambling in the years involved or in any year except by the extrajudicial statement of appellant which he refused to sign as untrue. All of the Government's witnesses testified contrary to the factual statement of appellee on the question as to whether appellant had made any money gambling.

On page 39 of Appellee's Brief, counsel for the Government asserts that there are "several possible sources of unreported income". Appellee contends that appellant was well known as a gambler during the years involved. Consider this bald statement in the light of the testimony of *all* the Government witnesses that he was not a gambler. Again, does the mere employment in a gambling house upon a set

salary constitute a source of income in the light of the testimony of Joe Gianelli, a prosecution witness, who testified that appellant never gambled in the gambling house, nor at any other place at any other time, and that appellant was not known as a gambler. (R. Tr. pp. 96, 97.) Again, how can the Government contend in its argument on this point that although the "receipts of the club were normal during the times that Campodonico assumed the managerial duties", (Appellee's Brief, Paragraph 5, p. 15) and in another portion of the brief, make the argument that as a possible source of income appellant "had access to large sums of money". This position is so untenable that it makes the argument sound ridiculous.

II. THE EVIDENCE DOES NOT SUPPORT THE CONVICTION OF APPELLANT ON COUNTS 1, 2 AND 3.

It is strange that appellant should have been acquitted of Counts 4 and 5 by the trial Court and convicted on Counts 1, 2 and 3. Precisely the same evidence was offered as to Counts 4 and 5 as was offered and received as to Counts 1, 2 and 3. The Court's attention is again invited to examine the Government's insert opposite page 5, and it will readily appear obvious that the increase in net worth in 1948 and 1949 was greater than the increase in 1946 and 1947 and by precisely the same expenditure method. Does it not appear inconsistent that an acquittal of the latter should have been granted if in

fact there was sufficient evidence to convict in 1946-1947. What additional evidence is there for the earlier years? None!

III. AUTHORITIES CITED BY APPELLEE DO NOT SUPPORT ITS CONTENTION AS TO THE CASE AT BAR.

It is submitted that appellee has sought to stretch the pertinence of the rules of law applicable to this case so as to effect a result not supported by authorities it has cited.

The following cases have been cited and referred to in the case at bar, and the rules thereof are well known to this Court:

Calderon v. United States, 207 Fed. 2d 263 (Cir. 9);

Bryan v. United States, 175 Fed. 2d 223 (Cir. 5);

United States v. Fenwick, 177 Fed. 2d 488 (Cir. 7);

Gariepy v. United States, 189 Fed. 2d 459 (Cir. 6);

Brodella v. United States, 184 Fed. 2d 823 (Cir. 6);

Pong Wing Quong v. United States, 111 Fed. 2d 751 (Cir. 9);

Gulotta v. United States, 113 Fed. 2d 683 (Cir. 8);

Yost v. United States, 157 Fed. 2d 147 (Cir. 4);

Spriggs v. United States, 198 Fed. 2d 782 (Cir. 9);
United States v. Chapman, 168 Fed. 2d 997 (Cir. 7);
United States v. Hornstein, 176 Fed. 2d 488;
Jelaza v. United States, 179 Fed. 2d 202;
Bell v. United States, 169 Fed. 2d 929;
Gleckman v. United States, 80 Fed. 2d 394;
Schuermann v. United States, 174 Fed. 2d 397.

Appellant merely desires to call the Court's attention to the doctrine of these cases in the light of the evidence in the case at bar, and to briefly discuss the ones most applicable to the issues of this case.

It is not for appellant to criticize the ruling of the *Bryan* and *Fenwick* cases, especially in view of the recent *Calderon* case, decided by this Court, in which these two cases are cited with approval.

Let us consider some of the cases cited by appellee insofar as they pertain to the facts of this case:

In *Schuermann v. United States,* 174 F. 2d 397, cert. den. 338 U. S. 831, these facts appeared:

1. The defendant was engaged in a numbers racket which was proven to be a gambling business.

2. The defendant rented a safety deposit box under an assumed name, which he frequently visited. (Concealment.)

3. The defendant purchased property in other people's names. (Concealment.)

4. The defendant admitted to the Revenue Agent that at the beginning net worth period, he had no large sums of currency on hand, thusly establishing a solid beginning net worth.

It is submitted, therefore, that the essential elements of a net worth case were established, namely:

1. Defendant was engaged in a lucrative business;

2. There was concealment of his assets; and

3. A solid beginning net worth was established.

In *Barcott v. United States,* 169 F. 2d 929, 336 U.S. 912, the Government proved that during the years in question, the defendant operated a large restaurant business in Tacoma, Washington; that he was in financial straits at the beginning net worth year, and that he offered bribes to Revenue Agents investigating the case, showing consciousness of guilt.

In *Gariepy v. United States,* 189 F. 2d 459, it was stipulated or uncontroverted that at the beginning net worth year selected by the Government, the defendant was in debt in the sum of $4,858.64, and that he was a doctor by profession, and thusly engaged in a lucrative calling.

In *Jelaza v. United States,* 179 F. 2d 202, the evidence disclosed that the defendant was engaged in a lucrative business, and the Government's proof rested

on the profits derived from his business, and that there was evidence other than the extrajudicial statement of the defendant as to his beginning net worth.

In *United States v. Hornstein,* 176 F. 2d 217, the evidence disclosed that the defendant was engaged in the business of buying and selling diamonds and jewelry. Moreover, the deficiency was based upon proven suppressed sales.

The foregoing are the leading cases relied upon by the Government's counsel, to substantiate his announced position to the trial Court, to-wit: That he would submit to the trial Court authority to the effect that it was unnecessary to establish a probable source of income in a net worth case. (R. T. 225.) All of the case cited have been considered, and it is submitted that in each of these cases a probable source of income has been established, and commented upon by the Courts.

It is significant that Counsel for the Government has failed to name one case dispensing with the requirement of a probable source of income, and has chosen instead to rely upon isolated statements in the above authorities cited, in which a possible source of income was established.

It is evident that counsel for the Government in the trial Court was relying on the existence of such authority, and that this was the theory of the Government's case against the appellant, which now clearly appears to be in error, and hence has sought

to rely on evidence which is not in the record. It is submitted that had the Government known that the law requires the Government to establish a possible source of income, this prosecution would never have been undertaken.

It appears from the brief of the Government in this case that there is no substantial disagreement as to the requirement in a net worth case that: (1) A satisfactory beginning net worth must be established; and (2) that a lucrative business or calling must also be proven, to establish a probable source of taxable income.

The Government appears to have based its case solely upon the theory that proof of acquisition of money or property is sufficient in and of itself to establish a net worth case, and conversely, that nothing further is required to establish the essential elements of a net worth case, to-wit: A solid beginning net worth, and a lucrative business or calling, tending to prove a source of taxable income. In effect, the Government contends that inferences may be drawn from the limited evidence presented, to establish the two essential elements mentioned.

The sole issue then to be determined by the Court is, whether or not, the circumstantial evidence offered by the Government is sufficient to establish taxable income?

As a matter of fact, the mere acquisition of money or property is not proof of income. It is merely a

fact from which, under certain circumstances, an inference may be drawn to show income. To infer from this inference that the appellant had no prior accumulated assets or money, is certainly drawing an inference from an inference—which is not legally permissible.

This rule is clearly set forth in *United States v. Cole,* 90 Fed. Supp 147, at page 156, as follows:

> "That no inference of fact or of law is reliably drawn from premises which are uncertain."

It is submitted that the uncertainty in the case at bar lies in the fact that contained in Exhibit 7 (Appellant's Statement) are admissions as to the appellant's occupation and source of income. Attention is here invited to the testimony offered by the Government that the appellant refused to sign the Statement because it was untrue, and by *all* Government witnesses on this point, it was further established beyond any peradventure of a doubt, and contrary to the inference, that the appellant did not receive any gambling winnings, nor that the appellant derived taxable income from any source whatsoever.

Reference is again hereby made to the opening statement of counsel for the Government, that the principal source of income was from gambling winnings.

It is significant to note, that although this point was clearly set forth in appellant's Opening Brief, the Government, in its Reply Brief, simply makes a

bald statement, unsupported by the evidence, that the appellant was well known as a gambler during the years involved, without one scintilla of evidence that he won any money gambling in the years in question.

In the case at bar, the proof of the source of income is relied upon by the Government merely because there was some evidence that the appellant's general reputation was that of a gambler. Further, it may be asserted that the Government knew prior to this prosecution, that the appellant's source of income was not gambling. (Referring to the testimony of Mandalari, Gianelli, McNabb, Seaman, and Revenue Agent Taynton, and Exhibit 7.)

The case of *Kirsch v. U.S.,* (CCA 8, 1949), 174 F. 2d 595, 37 AFTR 1492, directly involves this point. The facts of the above quoted case are as follows:

Defendant owned a tavern, in Waterloo, Iowa, and also made "Commissions" from illicit liquor sales. A large number of pay checks of employees of local industries were cashed at the tavern. Two bank employees, called by the Government, testified that these pay checks were either cashed at the bank or deposited to the tavern account. The deposits of the pay checks were frequent, and in comparatively large amounts. The business receipts of the tavern were also deposited in the same account, at the bank. The total amount of all of the deposits of the tavern was approximately $90,000.00 during the year 1944. While the exact method of computation is not stated in the

record, it appears that $35,431.00 represented the receipts from the tavern, and was treated as *identified* income, and the balance of $54,880.00 was treated as income but *unidentified.*

At the trial, a Government witness stated that he "endeavored to identify the deposits", but being unable to do so, "we have included them as income because they have not been identified". He further stated, "These unidentified deposits represent income to me for the purpose of conducting an audit of income." He stated that he had been told that a "lot of labor checks" had been cashed at the tavern, but that he made no investigation to find out whether or not that was true. He said: "We had no way of determining whether or not part of the deposits were income and the rest was for money cashing checks, and have charged up the entire bank account as income."

The Circuit Court stated,

> "It is readily obvious from the foregoing facts that the Government was fully cognizant of the fact prior to the trial, that a large part of the deposits made to the credit of the tavern account did not represent income."

In the trial Court there was a discussion involving the hypothetical question as to the amount of taxes due, in which question it was assumed that the unidentified deposits were income. The Court admonished the jury that that was a question for it, the jury, to decide.

In reversing the Judgment, the Circuit Court stated, that none of the foregoing considerations will justify the unqualified assumption of a fact as true that is known to be false. The hypothetical question assumed without qualification that all of the deposits in the tavern account and in defendant's personal account constituted income for tax computation purposes. That assumption of fact was not only without evidentiary support even from permissible inference from proven facts, but was definitely disproved by the Government's own evidence. It is one thing for a party to say, in effect, as was done in the *Gleckman* case, that he had exercised all of the means he reasonably could to determine how much of a bank account was income, had eliminated all he could determine was not income, and was therefore assuming, for the purpose of calculating taxes due, that the remainder was income, and quite another and different thing to say, in effect, as was done in this case—My evidence shows that all of these deposits were not income, but I do not know how much was not, I have made no effort to find out. So I am assuming that all are income and am casting the burden on the defendant to show, if he can, how much is not, or suffer the consequences. The latter proceeding cannot be approved. It should never be necessary for the Government to negative a defendant's defense in a hypothetical question such as this. But it always should be necessary that the facts and circumstances put in evidence by the Government, justify, by reasonable inference, at least, the truth of the assumed fact.

> "What constitutes a reasonable effort to establish the truth of the fact assumed, and what facts or circumstances will constitute a proper foundation for the assumption, and permit a reasonable presumption of the truth of the fact assumed in a hypothetical question, may not be narrowly circumscribed, but must be left to a considerable extent to the discretion of the trial court. But in this instance, there was no foundation for the assumption that all of the deposits constituted income."

From the foregoing decision, it appears that a trial judge is authorized and directed to consider the quantum of proof and draw reasonable inferences as to the weight to be given to certain circumstances. For instance, a bank account may or may not constitute satisfactory evidence of income. Ordinarily, it is left to a jury to determine the facts and draw inference as to the effect of having a bank account. In this case (*Kirsch*) there is no question but that the defendant had a bank account, but in view of the evidence, and the reasonable inferences to be drawn therefrom, the Appellate Court reversed, because the trial Court did not weigh the evidence and draw inferences in regard to the unidentified bank deposits. Specifically, there was sufficient evidence in the record from which an inference should have been drawn by the trial Court, that the unidentified deposits did not constitute income.

The two bank employees, testifying for the Government, stated that the defendant handled a large

number of payroll checks. Some of these were deposited to the tavern account, and the remainder cashed—evidently for the purpose of cashing other payroll checks. A deputy collector stated that he had been told that "a lot of labor checks" had been cashed at the tavern. The inference or conclusion to be drawn from this evidence is that the source of part of the deposits was the cash used to cash payroll checks—certainly not a taxable transaction. The Circuit Court held that the trial Court should have drawn this inference, and should not have permitted a hypothetical question from which a contrary conclusion might have been drawn by the jury, regardless of the admonition given to the jury as to their right to determine facts.

Similar questions are presented in the case at bar, in connection with the evidence relied upon by the Government to establish a beginning net worth, and a source of income. The Revenue Agent testified that he merely assumed that the appellant had no cash at the beginning of 1946, or December 31, 1945. This in spite of the fact that the record shows substantial expenditures of cash both before and after the beginning net worth period. The only condition under which this assumption might be justified would be to show a source of income during the years involved, from which the expended cash was derived. In this case, according to the evidence and the opening statement of counsel for the Government, the only source of income was that of gambling winnings. Not only is there a total lack of substantial evidence of gam-

bling winnings, but there is positive evidence, from the testimony of the Government's witnesses, that the appellant did not gamble and did not receive gambling winnings.

In the *Kirsch* case (supra) it is stated:

> "But it should always be necessary that the facts and circumstances put in evidence by the Government justify, by reasonable inference at least, the truth of the assumed fact."

The Circuit Court, evidently, was not satisfied with the presentation of the case by the Government, in that the investigating agent neglected to follow up known sources of information, which were essential for the adjudication of the case. The Court refused to go along with the arbitrary assumptions of the Government, and pointed out the facts and inferences from which a contrary conclusion should have been reached by the trial Court.

IV. APPELLANT'S CONSTITUTIONAL RIGHTS WERE VIOLATED BY THE LONG DELAY FROM THE SUBMISSION OF THE CASE TO THE RENDITION OF JUDGMENT.

Counsel for appellee in his reply brief (p. 49) states that appellant has cited no statute which defines the time within which a criminal action must be tried. The answer is that the United States Constitution is sufficient authority on this point. The argument of appellant, however, is not that the time consumed in his trial was too lengthy, but rather the time elapsing from submission of the case to decision, which was from May to the following June.

It appears to appellant that the Sixth Amendment to the United States Constitution is sufficient authority to preclude appellant's constitutional rights from being thus violated.

It is submitted that this vital issue should now be clarified by this Court. If this point is not now decided, may not a Court take a case under submission for years, thereby leaving a person dangling in mid-air as to his future?

In the case at bar, the appellant had nothing to do with the delay. It certainly would have been an inappropriate act for the appellant to have brought mandamus to compel a Court to render its decision, especially so, since nearly all of the remarks of the Court in reference to the sufficiency of the evidence were favorable to appellant.

CONCLUSION.

It is respectfully submitted that for the foregoing reasons, the judgment and sentence of the District Court should be reversed.

Dated, Stockton, California,
April 2, 1954.

Respectfully submitted,
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